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SHORT TITLE Greyhound Lines, Inc. DOCKETED: Jun 28 1985
VERSUS Wilhite, Melody, et al.

Entry	Date	Note	Proceedings and Orders
1	Jun 28 1985	D	Petition for writ of certiorari filed.
3	Jul 26 1985		Order extending time to file response to petition until August 14, 1985.
4	Aug 12 1985		Brief of respondents Melody Wilhite, et al. in opposition filed.
5	Aug 14 1985		DISTRIBUTED. September 30, 1985
6	Sep 18 1985	X	Reply brief of petitioner Greyhound Lines filed.
8	Oct 7 1985		REDISTRIBUTED. October 11, 1985
9	Oct 15 1985		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

84-2019

No. 84-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

GREYHOUND LINES, INC.,
Petitioner,

v.

MELODY WILHITE; LOCAL 1384,
AMALGAMATED TRANSIT UNION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the court below properly denied retroactive effect to this Court's decisions in *United Parcel Service v. Mitchell* and *DelCostello v. International Brotherhood of Teamsters.*

A. Whether a federal court of appeals may deny retroactive effect to a Supreme Court decision when the Supreme Court has, without reservation, itself applied the decision retroactively in the civil litigation before it.

B. Whether a federal court of appeals may deny retroactive effect to a Supreme Court decision solely because that decision, which resolves conflict in the federal courts, prescribes a civil statute of limitations shorter than the limitations period suggested by lower court precedent.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Greyhound Lines, Inc. is a wholly owned subsidiary of The Greyhound Corporation. The subsidiaries of Greyhound Lines, Inc. (except wholly owned subsidiaries) are: Greyhound Bus Depot of Atlanta, Inc.; Greyhound Lines of Canada Ltd.; Greyhound-Taseco Saudi Arabia Ltd.; Jefferson Lines Holding Company; Kerrville Bus Company, Inc.; Southeastern Stages, Inc.; Springfield Bus Terminal Corporation; Union Bus Station of Oklahoma City, Oklahoma; Wilmington Union Bus Station Corporation; and Texas, New Mexico, and Oklahoma Coaches, Inc. The affiliates of Greyhound Lines, Inc. (except for wholly owned subsidiaries of its parent, subsidiaries, or affiliates) are: Freeport Flight Services Ltd.; Glacier Park, Inc.; Greyhound Food Management of Texas, Inc.; Restaura, GmbH; Greyhound Services Saudi Arabia Ltd.; Armour S.A.E.; Greyhound Computer of Canada Ltd.; Collins, Collins & Rawlence Ltd.; G. G. Mortgagee Corporation; P. T. Gemini Greyhound Leasing Indonesia; and Tri-State Investment Company. Should the Court desire disclosure of wholly owned subsidiaries of these various entities, Greyhound Lines, Inc., will supplement its list of subsidiaries and affiliates.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Greyhound Lines, Inc., respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 1, 1985.

OPINION BELOW

The opinion of the Ninth Circuit is not reported. It is found in the Appendix at pages 1a through 3a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 1, 1985. App. 6a-7a. The Petition for a Writ of Certiorari has been

filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 10(b) of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. § 160(b), provides, in pertinent part:

> . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

Section 301(a) of the Labor Management Relations Act (the "LMRA"), 29 U.S.C. § 185(a), provides, in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, . . . may be brought in any district court of the United States having jurisdiction of the parties . . .

STATEMENT OF THE CASE

On December 15, 1979, Melody Wilhite and a fellow employee at Greyhound's Seattle facility were observed in a tavern during their lunch break. Having concluded that the two were consuming alcohol, local Greyhound management confronted them and allowed them to choose between voluntary resignation and termination. Wilhite chose to resign. Soon thereafter, however, she had second thoughts concerning her decision and enlisted the aid of her bargaining representative, Local 1384, Amalgamated Transit Union ("Local 1384").

On December 17, 1979, Local 1384's business agent filed a grievance and requested a hearing on her behalf. On December 26, 1979, Greyhound management responded by advising Local 1384 that Wilhite had resigned and that her resignation had been accepted. After receiving Greyhound's response, the business agent spoke with Wilhite about the grievance on at least two occasions, explaining that Local 1384 would not pursue the matter because of his determination that her resignation had been voluntary. The business agent's decision was affirmed by the Executive Board of Local 1384 at its regular meeting in January of 1980.

Approximately 16 months later, on May 26, 1981, Wilhite filed this action in the Superior Court of the State of Washington in King County, naming as defendants Greyhound, Local 1384, and the International union affiliated with Local 1384. Because Wilhite asserted a cause of action under Section 301 of the LMRA, 29 U.S.C. § 185, Greyhound removed the case to the United States District Court for the Western District of Washington pursuant to 28 U.S.C. §§ 1331, 1337 and 1441.

Wilhite's complaint alleged that Greyhound had breached its contract with Local 1384 by coercing her resignation on December 15, 1979. In addition, she claimed that Local 1384 and its affiliated International had breached their duty to provide Wilhite with fair representation subsequent to her resignation. Finally, Wilhite asserted that Greyhound's and Local 1384's actions discriminated against her on the basis of sex in violation of the Washington State Law Against Discrimination, Wash. Rev. Code § 49.60.010, *et seq.*

On June 29, 1983, the district court dismissed the International from Wilhite's lawsuit, reasoning that it owed no duty of fair representation to Wilhite because it was not her bargaining representative. On that same day, the court granted Greyhound's motion for summary judgment on the sex discrimination claim. The Section 301 suit against Greyhound, the duty of fair representation claim against Local 1384, and the state law sex discrimination claim against Local 1384 remained.

On June 8, 1983, after submission of the initial summary judgment motions in this case, this Court announced its decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), prescribing a six month statute of limitations for hybrid Section 301/duty of fair representation cases. Accordingly, in mid-August of 1983, Local 1384 and Greyhound moved to dismiss Wilhite's federal claims on the ground that her action had not been timely brought under *DelCostello*.

In response, Wilhite urged that *DelCostello* not be applied retroactively, pointing out that the Ninth Circuit had refused to apply retroactively this Court's decision in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), which had announced the statute of limitations principles overruled in *DelCostello*. In reply, Local 1384 argued that *DelCostello* was entitled to retroactive effect, noting, among other things, that this Court had itself applied the six month statute of limitations to bar the claims of two employees in *DelCostello*.

On September 9, 1983, the district court granted the motions and entered an order dismissing Wilhite's federal claims and remanding her pendant state law sex discrimination claim against Local 1384 to the State Superior Court. App. 4a-5a. Because Wilhite had filed her action one month *after* this Court's decision in *Mitchell*, the district court concluded that no question of retroactivity was presented with respect to the three-month statute of limitations in effect under that case. App. 5a. *See* Wash. Rev. Code § 7.04.180 (three-month statute of limitations for action to vacate arbitration award). Accordingly, the district court found it unnecessary to address the retroactivity of *DelCostello* in holding that Wilhite's claims were time barred under *Mitchell*. App. 5a.

Wilhite appealed to the United States Court of Appeals for the Ninth Circuit, which reversed in an unpublished opinion issued on April 1, 1985. App. 1a-3a. Relying

primarily upon its decision in *Barina v. Gulf Trading & Transportation Co.*, 726 F.2d 560, 563 (9th Cir. 1984), App. 8a-15a, the court ruled that neither *Mitchell* nor *DelCostello* governed Wilhite's action. App. 3a.

REASONS FOR GRANTING THE WRIT

This case presents substantial questions concerning the circumstances in which principles announced by this Court should be applied retroactively. The Ninth Circuit, in conflict with eight courts of appeal, has denied retroactive effect to this Court's decisions clarifying the limitations period applicable to hybrid Section 301/duty of fair representation actions. *See United Parcel Service v. Mitchell*, 451 U.S. 56 (1981); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). This conflict stems from fundamental differences among the circuits with respect to the standards to be applied in determining whether this Court's decisions apply retrospectively. Two courts of appeal have held that this Court conclusively answers retroactivity questions when it applies a newly-announced principle to the litigants before it, as it did in *DelCostello*. Between these courts and the Ninth Circuit, there exists clear conflict on the substantial and fundamental question of the precedential significance of this Court's adjudication of cases. In addition, the Ninth Circuit has parted from other courts of appeal in denying retroactivity to *Mitchell* and *DelCostello* solely because those decisions overruled some lower court precedent in order to resolve conflict and confusion in the circuits. The holding of the court below creates a *per se* rule that any new Supreme Court decision on limitation periods will not be applied retroactively to adversely affected litigants. This presents a substantial question as to the continued viability of the time-honored presumption that principles announced by this Court apply retroactively. Accordingly, review on certiorari is merited under Rule 17.1 of the Rules of the Supreme Court.

I. BY REFUSING TO APPLY RETROACTIVELY THE PRINCIPLES OF *MITCHELL* AND *DELCOSTELLO*, THE DECISION BELOW CONFLICTS WITH THE VIEWS OF OTHER CIRCUIT COURTS OF APPEAL

Until 1981, courts divided sharply over the appropriate statute of limitations to apply in hybrid cases alleging an employer's breach of a collective bargaining agreement under Section 301 of the LMRA, 29 U.S.C. § 185, and a union's breach of its duty of fair representation. Agreeing only that the limitations period should be borrowed from state law, *see Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05 (1966), federal courts had applied statutes ranging from 90 days, *Liotta v. National Forge Co.*, 629 F.2d 903, 906 (3d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981), to six years. *Mitchell v. United Parcel Service, Inc.*, 624 F.2d 394, 398 (2d Cir. 1980), *rev'd* 451 U.S. 56 (1981).[1] These different approaches resulted from conflicting perceptions of the nature of these hybrid actions, some courts finding them to be tort actions, others concluding that they sounded in contract, and still others finding them to derive from statutory rights. *See* 2 C. Morris, ed., *The Developing Labor Law* (2d Ed. 1983), pp. 1356-57 (collecting cases).

This Court, however, had foreshadowed a different approach in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), when it noted that a union's duty of fair representation implicated the "integrity of the arbitral process." 424 U.S. at 567. Recognizing this principle, the Third Circuit in 1980 concluded that hybrid Section 301/duty of fair representation suits should be governed by the state statute of limitations applicable to actions to vacate arbitration awards. *Liotta*, 629 F.2d at 906 (disimissing Section 301 action against employer).

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[1] Truly scores of decisions applied various "appropriate" statutes of limitation before *Mitchell* resolved the issue. They are collected at 2 C. Morris, ed., *The Developing Labor Law* (2d Ed. 1983), pp. 1355, *et seq.*

The district court in *Mitchell* took this approach in concluding that an employee's hybrid action was time barred. *See Mitchell*, 624 F.2d at 396. The view was ultimately adopted by this Court in *Mitchell*, which reversed the Second Circuit and reinstated the district court's order dismissing the lawsuit against the employer. 451 U.S. at 64. In so doing, this Court broke no new ground. Rather, it relied upon the then accepted principle that the most analogous state statute of limitations should control. 451 U.S. at 60. *See Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. at 704-05. The Court rested its choice of limitations in large part upon the observation that *Hines* "strongly supports borrowing the limitations period for actions to vacate arbitration awards." 451 U.S. at 61.

The Court in *Mitchell* declined to address the contention that a federal statute of limitations should govern hybrid actions. 451 U.S. at 60 n. 2. That question was, however, squarely presented in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151. Overruling *Mitchell*, the Court in *DelCostello* determined that the six month statute of limitations contained in Section 10(b) of the Act, 29 U.S.C. § 160(b), should apply to actions against both the employer and the union in Section 301/duty of fair representation lawsuits.

In the brief interval between *Mitchell* and *DelCostello*, few courts had occasion to consider *Mitchell's* application to causes of action accruing prior to that decision. The Sixth Circuit, however, did apply *Mitchell* retroactively based upon its conclusion that this Court's decision did not represent a "clean break" with prior decisions, but merely a clarification of the law on "an issue on which there is circuit conflict and confusion." *Lawson v. Truck Drivers, Chauffeurs, and Helpers*, 698 F.2d 250, 254 (6th Cir.), *reh'g denied and reh'g en banc denied, cert. denied*, 104 S. Ct. 69 (1983). Without undertaking any detailed retroactivity analysis, other courts of appeal also applied

Mitchell to pending cases. *See, e.g., McNutt v. Airco Industrial Gases Division*, 687 F.2d 539 (1st Cir. 1982); *Davidson v. Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981), *cert. denied*, 455 U.S. 947 (1982). The views of these courts found express approval in Justice O'Connor's dissent in *DelCostello*, in which she observed that it was "quite appropriate to apply *Mitchell* retroactively." 462 U.S. at 175, n.2 (O'Connor, J., dissenting).

The Ninth Circuit, however, took a different approach, holding in *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349 (9th Cir. 1981), that *Mitchell* could not apply to causes of action accruing before this Court's decision in that case. Undertaking a cursory analysis purportedly premised on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the court of appeals held that previous Ninth Circuit precedent on the statute of limitations applicable to actions against *unions* rendered it unjust to apply *Mitchell* to existing causes of action against *both* unions and employers. 652 F.2d at 1353, citing *Price v. Southern Pacific Transport. Co.*, 586 F.2d 750, 752-53 (9th Cir. 1978) (in action against union, limitations period applicable to actions based upon a statute governs). *See also Barina v. Gulf Trading & Transportation Co.*, 726 F.2d 560, 562 (9th Cir. 1984) (holding that *Mitchell* applies prospectively only), App. 12a-13a.

The conflict between the Ninth Circuit and the rest of the nation has continued since this Court decided *DelCostello*. Every circuit court except the Tenth Circuit and the District of Columbia Circuit has considered retroactive application of *DelCostello*. Every court except the Ninth Circuit has determined that the case *does* apply retroactively. *Graves v. Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Welyczko v. U.S. Air, Inc.*, 733 F.2d 239 (2d Cir.), *cert. denied*, 105 S. Ct. 512 (1984), App. 16a-20a; *Perez v. Dana Corp.*, 718 F.2d 581 (3d Cir. 1983); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, 105

S. Ct. 292 (1984); *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Smith v. General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) (*en banc*); *Ernst v. Indiana Bell Telephone Co.*, 717 F.2d 1036 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 707 (1984); *Lincoln v. District 9 of International Association of Machinists*, 723 F.2d 627 (8th Cir. 1983); *Rogers v. Lockheed Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *reh'g denied*, 727 F.2d 1116 (11th Cir.), *cert. denied*, 105 S. Ct. 292 (1984). The Ninth Circuit's view, as expressed in this case, stands alone on this issue. *See Barina v. Gulf Trading & Transportation Co.*, 726 F.2d at 564, App. 13a-15a; *Edwards v. Teamsters Local No. 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984).

This conflict creates manifest injustice, for it results in differing treatment for similarly situated litigants. In this case, Wilhite claims to have suffered damage when Greyhound allegedly coerced her resignation on December 15, 1979. She then waited until May 26, 1981, after this Court decided *Mitchell*, to file her suit. Other litigants allegedly suffering injury and filing suit *before* Wilhite have been denied relief under the principles announced in *DelCostello*. *See, e.g., Murray v. Branch Motor Express Co.*, 723 F.2d at 1148 (damages allegedly suffered on April 22, 1976; suit filed on September 13, 1978); *Rogers v. Lockheed-Georgia Co.*, 720 F.2d at 1250 (in consolidated cases, suits dismissed when litigants' causes of action accrued in April of 1979, May of 1979, and October of 1979, respectively; suits filed in March of 1980, June of 1980, and May of 1981, respectively).

This disparate treatment presents an inherently substantial issue because of its effect on the integrity of the federal judicial process. Litigants contesting federal issues implicating national labor policy should not find their rights differing from one circuit to the next. That is, however, precisely the effect of the decision below. Three courts of appeal have applied *DelCostello* retro-

actively in cases involving Greyhound or its affiliates. *Holmes v. Greyhound Lines, Inc.*, 757 F.2d 1563 (5th Cir. 1985); *Bourquin v. Prophet Foods Co., presently Greyhound Food Management, Inc., et al.*, No. 83-1248 (6th Cir. June 7, 1985) (unpublished; not to be cited as precedent); *Vadasz v. Greyhound Lines, Inc.*, 723 F.2d 620 (8th Cir. 1983) (*per curiam*); *Aarsvold v. Greyhound Lines, Inc.*, 724 F.2d 72 (8th Cir. 1983) (*per curiam*), *cert. denied*, 104 S. Ct. 3538 (1984). Only in the Ninth Circuit has Greyhound been deprived of the right to repose provided by *DelCostello*. This Court should therefore grant the writ to resolve the conflict on this important issue of federal labor law.

II. THE DECISION OF THE COURT OF APPEALS MANIFESTS A FUNDAMENTAL DIVISION OF THE CIRCUITS ON THE APPLICATION OF RETROACTIVITY PRINCIPLES SET FORTH IN *CHEVRON OIL CO. v. HUSON*

A court ordinarily "must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281 (1969). *See United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801). Thus, when confronted with a change in law occasioned by a judicial ruling, a court must apply the "new" law even to an "old" case. *Thorpe*, 393 U.S. at 282. This general rule admits of only limited exceptions. In civil cases, this Court has held that a judicial decision will have prospective effect if it meets certain criteria:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Chevron Oil Co. v. Huson, 404 U.S. at 106-07 (citations omitted). Using this test, the Court in *Chevron* declined to apply to the parties before it a state statute of limitations adopted in that case. *Chevron*, 404 U.S. at 109.

The court of appeals in this and other cases has fundamentally misperceived the nature and scope of the *Chevron* analysis, raising issues of substantial importance in the future disposition of retroactivity questions. As the Second and Sixth Circuits have recognized, a court of appeals should not conduct a *Chevron* inquiry if this Court has, without reservation, applied the "new" legal principle to the parties before it. When that has occurred, as it did in both *Mitchell* and *DelCostello*, the courts of appeal should apply the same principle in the same fashion as this Court. Because the court below refused to do so, its decision was in error.

Furthermore, even when *Chevron* applies, its requirement that a decision "establish a new principle of law" is not satisfied by the mere existence of contrary case law in the federal courts. This Court, recognizing that decisions are presumed to have retroactive effect, has instead required a sharp break from a near unanimous view of lower courts. In finding that *DelCostello* and *Mitchell* should be applied only prospectively, the Ninth Circuit rejected this principle, in conflict with other courts of appeal. The decision of the court below has thus raised a substantial question as to the continued viability of the fundamental presumption in favor of applying the law in effect at the time of a court's decision.

A. A Substantial Question Is Presented By the Conflict Between the Court Below and Other Circuits as to Whether *Chevron* Applies to New Principles That This Court Has Itself Applied Retrospectively.

To assure rationality and uniformity in decisions, retroactivity should not be determined on a case-by-case basis.[2] As the Sixth Circuit has observed, a contrary view with respect to *DelCostello* would have the "unacceptable" result of "a separate statute of limitations for every section 301 plaintiff with a case pending when *DelCostello* came down . . ." *Smith v. General Motors Corp.*, 747 F.2d at 375, n.6. With this principle of uniformity in mind, both the Second and Sixth Circuits have found that this Court disposed of retroactivity questions when it applied *DelCostello* principles to dismiss the claims of Flowers and Jones, two of the litigants before the Court in that case. *See* 462 U.S. at 172 (holding action of Flowers and Jones "is governed by the six-month provision of § 10(b)").

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[2] This Court has generally analyzed retroactivity questions with a broad frame of reference. *See, e.g., Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (discussing consequences of retroactivity for "cities, bondholders and others connected with municipal utilities"). In one unusual case concerning resale price maintenance under the Sherman Act, the Court did appear to authorize case-by-case adjudication of retroactivity. *See Simpson v. Union Oil Co.*, 377 U.S. 13, 24-25 (1964), *on remand*, 270 F. Supp. 754 (N.D. Cal. 1967), *aff'd*, 411 F.2d 897 (9th Cir.), *reversed*, 396 U.S. 13 (1969). The Court's second opinion in that case, however, revealed that it left the door open for prospective application *not* to similarly situated litigants, but to parties whose acts were based "on quite different considerations" than those that guided the defendant whose conduct the Court had found unlawful. 396 U.S. at 14. *Cf.* 411 F.2d at 901 (explaining Court's rationale in other terms; *reversed*, 396 U.S. at 14). When thoroughly analyzed, the Court's decision in *Simpson* seems to be little more than a recognition that differing motivations of defendants might distinguish other cases as a matter of substantive law. The same is not true here, for state of mind has no bearing upon the appropriate statute of limitations.

In reaching this conclusion, the Second Circuit noted that *Chevron* has only limited application when a court of appeals considers new principles announced by the Supreme Court. *Chevron*, the Second Circuit wrote, must guide a court of appeals in considering "a new rule which our court [has] pronounced . . ." *Welyczko v. U.S. Air, Inc.*, 733 F.2d at 241, App. 20a. The same analysis would apply to a principle as to which this Court has "given no indication" on the issue of retroactivity. 733 F.2d at 241, App. 20a. However, the Second Circuit observed that the Court in *DelCostello* had "applied the time bar retroactively to govern the very claim at issue in the case before it." 733 F.2d at 241, App. 20a. Noting that this Court "is well aware of how to avoid the effects of applying one of its rulings retroactively to the case at bar," *id.*, quoting *Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064, 1073 (2d Cir. 1977), the Second Circuit found no reason to refrain from applying a rule of this Court retrospectively "when [the Supreme] Court itself has given retrospective application to a newly adopted principle . . ." 733 F.2d at 241, App. 20a. In an *en banc* decision, the Sixth Circuit adopted this reasoning. *Smith v. General Motors Corp.*, 747 F.2d at 375.

In contrast to the Second and Sixth Circuits, the Ninth Circuit conducted a *Chevron* analysis to decide the retroactivity question, indicating its intent to disregard this Court's unconditional disposition of the cases reviewed in *DelCostello*. The Ninth Circuit's approach, however, bespeaks a fundamental misapprehension of the Court's function. This Court decides cases, not abstract principles. *See Muskrat v. United States*, 219 U.S. 346, 361 (1911) (the Court's role is to decide "the rights of litigants in justiciable controversies"). In so doing, the Court necessarily passes upon the questions essential to the dispositions it makes.[3] *See Public Service Commis-*

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[3] This Court was aware of the retroactive implications of *DelCostello*, as Justice O'Connor's dissent, which specifically ad-

sion of Utah v. Wycoff Co., 344 U.S. 237, 241 (1952) (considering appropriateness of declaratory relief, despite lower courts' failure to consider the issue, because "that inquiry is one which every grant of this remedy must survive").

Thus, when the Court found the suit by two employees in *DelCostello* to be time-barred, it implicitly held it appropriate to apply the newly announced principle to litigants with cases pending as of that date. To hold otherwise, as did the court below, verges on a suggestion that this Court disposes of cases based upon new principles without regard to the justice of applying those principles. Such a proposition dramatically understates this Court's role in adjudicating the rights of the parties before it. To paraphrase this Court's observations in considering retroactivity of new Fourth Amendment doctrines, "[i]t would be ironic indeed" if the Ninth Circuit were permitted to reverse judgments applying *DelCostello*'s rule, when in *DelCostello* itself the Court reversed a directly contrary judgment of the Second Circuit. *United States v. Johnson*, 457 U.S. 537, 555 (1982).

The Ninth Circuit's divergence from the views of the Second and Sixth Circuits thus reflects a clear division on a crucial issue: the degree to which the *Chevron* criteria may be employed to deny retroactivity to a principle that this Court has itself applied retroactively in civil litigation. This presents a substantial question whose resolution will determine the precedential value of this Court's future dispositions. The Court should grant the

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dressed the retroactivity of *Mitchell*, demonstrates. *See* 462 U.S. at 175 n.2. Furthermore, the fact that the parties in *DelCostello* did not raise the question fails to diminish the effect of the Court's retrospective application of its decision to Flowers and Jones. When the Court perceives an injustice in applying a decision retroactively, it plainly has authority to dispose of the problem *sua sponte* as an incident to deciding a case based upon the new principle.

writ to reaffirm its primacy in deciding the issues necessarily placed before it.

B. A Substantial Question Is Presented by the Holding of the Court Below, in Conflict With Other Circuits, That the Mere Existence of Contrary Circuit Precedent Necessarily Precludes Retroactive Application of This Court's Decisions to Adversely Affected Litigants.

Most courts considering *Mitchell's* and *DelCostello's* retroactivity have, like the court below, improperly analyzed the issue under *Chevron*. Those courts have, however, reached a conclusion different from that of the Ninth Circuit. This division among the circuits stems from a sharply different view of the extent to which the existence of circuit court precedent at odds with a Supreme Court decision fulfills the first *Chevron* criterion. Thus, even if *Chevron* applies when this Court has implicitly decided the retroactivity question, the decision of the court below raises a substantial issue as to the nature of the *Chevron* inquiry.

The Ninth Circuit has not denied that retroactive application of *Mitchell* and *DelCostello* would further the purpose of the rules adopted in those cases. *See Barina v. Gulf Trading & Transportation*, 726 F.2d at 564, App. 14a (retroactive application of *DelCostello* would further purpose of the rule); *Singer v. Flying Tiger Lines*, 652 F.2d at 1353 (failing to address this criterion in analyzing *Mitchell*). The disagreement between the court below and other circuits thus derives from its application of *Chevron's* first criterion, *i.e.*, the degree to which the new principle represents a clear break from prior precedent, and the third criterion, *i.e.*, the degree to which application of the new principle would have inequitable results. Because it regards these two inquiries as "closely related," *Glover v. United Grocers*, 746 F.2d 1380, 1382 (9th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3824 (U.S.

1985), the court of appeals' reasoning rests almost exclusively upon its finding that *Mitchell* and *DelCostello* departed from prior precedent. Indeed, that is the threshold question. *Milton v. Wainwright*, 407 U.S. 371, 381, n.2 (1972) (Stewart, J., dissenting) ("An issue of 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law"); *Kremer v. Chemical Construction Corp.*, 623 F.2d 786, 789 (2d Cir. 1980) ("unless the first [*Chevron*] factor is satisfied, there is no occasion to consider the other two"), *aff'd*, 456 U.S. 461 (1982), and cases cited therein.

In deciding that *Mitchell* broke with prior law, the court of appeals relied upon Ninth Circuit authority suggesting that a longer limitations period applied in suits against unions and Eighth Circuit authority on suits against employers.[4] *Singer*, 652 F.2d at 1353 (discussing *Mitchell*); *see also Barina*, 726 F.2d at 562, App. 10a. The mere existence of this precedent, however, hardly suggests that this question of federal law was settled before this Court gave its guidance. To the contrary, the Ninth Circuit has acknowledged that a review of early authorities on this issue discloses "proliferating cases in which the various district and circuit courts were applying a bewildering variety of local statutes of limitations to cases challenging the conduct of employers and unions with reference to labor grievances." *Glover v. United Grocers*, 746 F.2d at 1382 (describing situation before *DelCostello*).

[4] The Ninth Circuit's confusion on this issue is illustrated by the fact that it did not announce a "pre-*Mitchell*" statute of limitations for actions against employers until after *Mitchell* was decided. *See* App. 2a; *Singer*, 652 F.2d at 1353 (applying California's four-year statute in reliance on Eighth Circuit precedent); *Christianson v. Pioneer Sand & Gravel Co.*, 681 F.2d 577, 581 (9th Cir. 1982) (applying Washington's three year statute of limitations). In these circumstances, it is difficult to discern how *Mitchell* could break sharply even from precedent within the circuit.

This Court should dispel the unfortunate notion that its resolution of such turmoil can give rise to questions of retroactivity. The first *Chevron* criterion can be fulfilled only when a decision of this Court

> explicitly overrules a past precedent of *this Court*, . . . or disapproves a practice *this Court* arguably has sanctioned in prior cases, . . . or overturns a longstanding and widespread practice to which this Court has not spoken, but which a *near-unanimous* body of lower court authority has expressly approved.

United States v. Johnson, 457 U.S. at 551 (citations omitted) (emphasis added). *Mitchell* did none of these things, as even a cursory analysis of that decision shows.

Given the many approaches to this unsettled issue, litigants (and the judiciary) could hardly point to any "near-unanimous" view overruled by *Mitchell*. Nor could any litigant claim that *Mitchell*, in applying state statutes governing efforts to overturn arbitration awards, relied upon unfamiliar principles. Like the lower court decisions addressing the issue, *Mitchell* chose an analogous state statute. *See* 451 U.S. at 60. And in designating that statute, it looked not solely to questions of public policy or legislative history, but to its decision in *Hines* five years earlier. *See Mitchell*, 451 U.S. at 61. *Mitchell* thus did not "mark a sharp break in the web of the law." *See Milton*, 407 U.S. at 381, n.2 (Stewart, J., dissenting). Rather, *Mitchell* was but a part of that seamless web, relying upon established authority.

By the mere fact that *Mitchell* clarified confusing lower court precedent, however, the court of appeals found retroactivity inappropriate. If that were sufficient grounds for applying a decision prospectively, the very fact that "new law" is "new" would be enough to deny it retrospective effect, no matter how unsettled "old" law might have been. The Ninth Circuit's approach thus would grant prospective effect to any litigant adversely

affected by a new decision on statutes of limitation, a *per se* result at odds with the painstaking analysis this Court undertook in *Chevron*. This would turn on its head the salutary principle "that we should not normally have one law for old cases and another for new cases." *Lawson*, 698 F.2d at 254.

Thus, as the district court held, *Mitchell* should have governed this case, which was not even filed until after this Court decided *Mitchell*. Consequently, *DelCostello*, which extended by three months the applicable statute of limitations under *Mitchell*, could have applied retroactively as well. *See Glover*, 746 F.2d at 1382 (*Del Costello* applies retroactively in Ninth Circuit when effect is to lengthen statute of limitations prescribed by *Mitchell*). Because Wilhite's claim was time-barred under either decision, the court below erred in reversing the district court's dismissal.

This error relates not only to the retroactive application of *Mitchell* and *DelCostello*. Rather, it reflects a disregard of the stabilizing rule that this Court's decisions, even if announcing "new" principles, must be presumed to apply to all pending and future cases, no matter when the rights asserted accrued.[5] The substantial question presented by the Ninth Circuit's abandonment of this presumption will arise each time that court feels it necessary to apply its eccentric version of *Chevron*. As a consequence, this Court should grant the writ to address this important question of *Chevron's* application.

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[5] Petitioner does not suggest that *DelCostello* should be applied to permit collateral attacks on judgments that became final when now-overruled concepts governed. *See Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375 (1940) (decision will not be applied retroactively to permit collateral attack on judgment as to which no review was sought).

CONCLUSION

For these reasons, a writ of certiorari should issue to review and reverse the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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June 28, 1985

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-4212

D.C. No. C81-739M

MELODY WILHITE,
Plaintiff-Appellant,
vs.

GREYHOUND LINES, a corporation; and LOCAL 1384, AMALGAMATED TRANSIT UNION, a Labor Union; and AMALGAMATED TRANSIT UNION, AFL-CIO, a Labor Union,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington

Honorable Walter T. McGovern, Chief Judge
United States District Judge, Presiding

Submitted: December 27, 1984 **

[Filed April 1, 1985]

** The panel is unanimously of the opinion that oral argument is not required in this case. Fed. R. App. P. 34(a); Rule 3(f), Rules of the Ninth Circuit.

Before: GOODWIN, KENNEDY, and FLETCHER, Circuit Judges.

MEMORANDUM *

Melody Wilhite brought suit against both her former employer, Greyhound Lines, and her union, Local 1384, Amalgamated Transit Union, alleging breach of contract by Greyhound and breach of the duty of fair representation by the union. She filed her complaint in state court on May 26, 1981, sixteen months after her final day of work for Greyhound. Defendants removed the action to the United States District Court for the Western District of Washington and moved to dismiss the action on the basis of the statute of limitations. The district court, applying Washington's three month statute of limitations for vacating arbitral awards, Wash. Rev. Code § 7.04.180 (1981), granted defendants' motion to dismiss and remanded plaintiff's state law claim. From this decision Wilhite appeals.

When plaintiff's cause of action accrued, the period of limitations applicable in Washington to hybrid 301 actions was three years. *Christianson v. Pioneer Sand & Gravel Co.*, 681 F.2d 577, 581 (9th Cir. 1982) (Wash. Rev. Code § 4.16.080(3)'s three year statute of limitations applies to suits against employers); *Washington v. Northland Marine Co.*, 681 F.2d 582, 586 (9th Cir. 1982) (Wash. Rev. Code § 4.16.080(2)'s three year statute of limitations applies to suits against unions).

By the time appellant had initiated this action, the Supreme Court had issued its decision in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), and the applicable period of limitations for section 301 actions against employers was the three-month period of limitations set forth in section 7.04.180 of the Washington Revised Code. *See Mitchell*, 451 U.S. at 64; *Buscemi v.*

* This disposition is not intended for publication and shall not be cited as precedent. Rule 21, Rules of the Ninth Circuit.

McDonnell Douglas Corp., 736 F.2d 1348, 1351 (9th Cir. 1984); *McNaughton v. Dillingham Corp.*, 707 F.2d 1042, 1046 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 291 (1984). *Mitchell* does not, however, govern appellant's suit against her employer. *Barina v. Gulf Trading & Transportation Co.*, 726 F.2d 560, 563 (9th Cir. 1984). Rather, Wilhite's action against Greyhound is controlled by the three-year statute of limitations applicable when her cause of action accrued. *Christianson*, 681 F.2d at 581; *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981).

The district court also erred in applying *Mitchell* to Wilhite's suit against her union. *Barina*, 726 F.2d at 562; *McNaughton*, 707 F.2d at 1047-48. The relevant period of limitations at the time suit was commenced was three years. *Northland Marine Co.*, 681 F.2d at 586.

After the action was filed, the Supreme Court held that an employee's action against either the employer or the union under the LMRA is governed by the six-month limitations period of section 10(b) of that Act. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 171-72; *see* 29 U.S.C. § 160(b) (1982). *DelCostello* does not, however, control the result here, for this court has refused to give it retroactive application where its effect would be to shorten the applicable state statute. *Barina*, 726 F.2d at 563-64; *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036, 1040-41 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984); *cf. Glover v. United Grocers, Inc.*, 746 F.2d 1380, 1382 (9th Cir. 1984) (*DelCostello* will be retroactively applied where effect of such application is to lengthen time in which to file).

Wilhite's suit, filed sixteen months after the accrual of her cause of action, is timely as against both defendants. The order of the district court is accordingly reversed. Both sides are to bear their own costs on appeal.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C81-739M

MELODY WILHITE,
Plaintiff,

v.

GREYHOUND LINES, *et al.*,
Defendants.

[Filed Sept. 9, 1983]

ORDER OF DISMISSAL AND ORDER OF REMAND

This case comes on for consideration before the undersigned judge of the above-entitled court on the defendants' motion to dismiss. The ground for the motion is the failure of the plaintiff to file her action within the applicable limitations period.

The complaint sets forth claims against plaintiff's employer under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1976), and against her union for its alleged breach of its duty of fair representation. Under *DelCostello v. Teamsters*, 51 U.S.L.W. 4693 (U.S. June 8, 1983), the limitations period applicable to such joint breach-of-contract/duty-of-representation actions is borrowed from the provisions governing unfair-labor-practice claims brought before the National Labor Relations Board. This period is six months. 29 U.S.C. § 160(b) (1976). Judged by this standard, the current plaintiff's claim was untimely by ten months. The plaintiff argues, however, that the standard announced by the Court in *DelCostello* in June 1983 should not retroactively apply to bar her action filed in May 1981.

DelCostello overturned the longstanding rule that joint breach-of-contract/duty-of-representation claims incorporate the limitations period of the most analogous state-law cause of action. It does not appear, however, that either *DelCostello* or the question of its retroactivity make any difference in the question of the timeliness of the current plaintiff's action.

In May 1981 when the plaintiff filed this action, the question of its timeliness was determined under *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981). In *Mitchell*, decided in April 1981, the Court held as a matter of federal law that a joint breach-of-contract/duty-of-representation action was more analogous to a state-court action to vacate an arbitration award than it was to other types of state-law actions. Therefore, the limitations period governing such joint federal claims was to be that limitations period which governed state-law actions to vacate arbitrations. In Washington this period is three months. Wash. Rev. Code § 7.04.180 (1981); *see Engelsberg v. Transcon Lines*, 530 F. Supp. 628, 632 (W.D. Wash. 1982). Under *Mitchell*, it was this three-month period, incorporated into federal law, which governed the timeliness of plaintiff's action. Hence the plaintiff's action was untimely when filed regardless of the retroactivity of the recent *DelCostello* decision. *Mitchell* was rendered prior to the filing of the current lawsuit and no question of retroactivity is presented.

For these reasons, the plaintiff's federal claims must be dismissed as untimely. Since no basis remains for jurisdiction over the pendent state-law claim, the state-law claim is hereby remanded to the King County Superior Court pursuant to 28 U.S.C. § 1447(c) (1976).

DATED this 9th day of September, 1983.

/s/ Walter T. McGovern
WALTER T. McGOVERN
Chief United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-4212

DC# CV 81-739M

MELODY WILHITE,
Plaintiff-Appellant,

—vs—

GREYHOUND LINES, a corporation; and LOCAL 1384, AMALGAMATED TRANSIT UNION, a Labor Union; and AMALGAMATED TRANSIT UNION, AFL-CIO, a Labor Union,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington (Seattle)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment

of the said District Court in this Cause be, and hereby is reversed & remanded each side to bear their own costs on appeal.

A TRUE COPY
ATTEST
Apr. 23, 1985
Clerk of Court

by: /s/ Joseph Williams
Deputy Clerk

Filed and entered: April 1, 1985

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 83-5752

CARMELO REYES BARINA,
Plaintiff-Appellant,

v.

GULF TRADING AND TRANSPORTATION COMPANY, A DIVISION OF GULF OIL CORPORATION, a Corporation and THE NATIONAL MARITIME UNION OF AMERICA, an unincorporated association,
Defendants-Appellees.

Argued and Submitted Dec. 7, 1983
Decided Feb. 23, 1984

Before SKOPIL, FERGUSON and CANBY, Circuit Judges.

CANBY, Circuit Judge:

Barina brought this action against his employer under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and against his union for violating its duty of fair representation. The district court dismissed the entire action as untimely. In this appeal, we must decide whether to apply retroactively the statute of limitations required by either *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981), or *DelCostello v. International Brotherhood of Teamsters*,

—— U.S. ——, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). We conclude that neither *Mitchell* nor *DelCostello* should be applied retroactively. We therefore reverse.

BACKGROUND

Gulf Trading and Transportation Company (Gulf) discharged Barina on October 22, 1979. Barina protested to his union, the National Maritime Union (NMU). NMU obtained a settlement of the grievance which afforded Barina reinstatement, but not payment of full back wages.[1] NMU notified Barina of the settlement by letter on June 11, 1980. Barina disapproved of the settlement and brought suit on June 24, 1981, against Gulf under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and against NMU for violation of its duty of fair representation. Following the pattern in hybrid § 301/fair representation actions, the complaint alleged that the union violated its duty of fair representation during the grievance proceeding and that the terms of the settlement violated the collective bargaining agreement.

Barina's cause of action accrued on July 12, 1980.[2] Under the then prevailing law, Barina's action against

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[1] The settlement resulted from an informal grievance proceeding. Although the settlements involved in *Mitchell* and *DelCostello* resulted from arbitration, not an informal grievance proceeding, nothing turns on this distinction. The same limitation periods apply whether an employee's grievance is resolved with or without going to arbitration. *McNaughton v. Dillingham Corp.*, 707 F.2d 1042, 1046 (9th Cir. 1983), *reh'g denied*, 722 F.2d 1459 (9th Cir. 1984).

[2] The district court selected July 12, 1980, as the date of accrual because the collective bargaining agreement afforded NMU 30 days to take a grievance decision to arbitration. Therefore Barina knew, or should have known, by July 12 that his dispute with Gulf had been finally resolved. Barina contends that accrual occurred later. Our disposition of the case makes it unnecessary to determine which of the dates urged by the parties is the correct one;

Gulf and NMU was timely. Because California law would have been the source of the applicable limitations,[3] Barina had four years to file his suit against his employer, *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981) (applying the four-year limitation for suits on written contracts provided by Cal.Civ.Proc. Code § 337), and three years to file his suit against the union, *id.* (applying the three-year limitation for suits "upon liability created by statute" provided by Cal.Civ. Proc.Code § 338(1)); *accord Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036 (9th Cir.1983). As Barina filed his action less than a year after it accrued, his suit fell well within the then prevailing time limitations.

The district court, however, applied *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981), retroactively.[4] It accordingly dismissed Barina's action as time barred. *Mitchell* held that the state limitation on challenges to commercial arbitration applied to suits brought by an employee against his employer to set aside a labor arbitration decision. The district court interpreted *Mitchell* as applying both to Barina's claim against Gulf and to his fair representation claim against NMU. Because California law provides a 100-day limitation period for challenges to commercial arbitration, Cal.Civ.Proc.Code § 1288.2, the district court concluded that Barina's claims against Gulf and NMU were time barred.

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all are within the limitation period that we apply. We therefore need not resolve whether accrual occurs when the employee learns, or should have learned, that his dispute was finally resolved, as the district court held, or whether accrual occurs when the employee learns, or should have learned, that the union may have violated its duty of fair representation. For simplicity, we accept the district court's determination of accrual.

[3] The parties agree that California is the appropriate source for all relevant state law.

[4] *Mitchell* was decided on April 20, 1981, slightly more than nine months after Barina's cause of action accrued.

After the district court's decision dismissing Barina's action, the Supreme Court decided *DelCostello v. International Brotherhood of Teamsters*, —— U.S. ——, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). *DelCostello* holds that the applicable statute of limitations in hybrid § 301/ fair representation actions brought against the employer and the union is the six-month limitation period contained in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). Gulf and NMU argue that, if we decline to uphold the district court's retroactive application of *Mitchell*, we should nevertheless affirm the district court by giving retrospective operation to *DelCostello*.

ANALYSIS

I. Barina's suit against NMU

The district court erred in applying *Mitchell* retroactively to Barina's claim against NMU. We have held that *Mitchell* applies only to the employee's claim against his *employer* and that it does not affect the limitation applicable to the employee's claim against his union. *McNaughton v. Dillingham Corporation*, 707 F.2d 1042, 1047-48 (9th Cir. 1983) (*"McNaughton I"*), *reh'g denied*, 722 F.2d 1459 (9th Cir. 1984) (*"McNaughton II"*); *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036, 1039-40 (9th Cir. 1983). Those holdings control here.

Nor can *DelCostello* be applied retroactively to bar Barina's claim against NMU. We squarely confronted that question in *Edwards v. Teamsters Local No. 36*, 719 F.2d 1036, 1040-41 (9th Cir. 1983). There we decided that *DelCostello* was not to be applied retroactively. *Accord McNaughton II.*[5]

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[5] We recognize that the Third, Fourth, Fifth, Eighth and Eleventh Circuits reached conclusions contrary to *Edwards* and

Because *Mitchell* is inapplicable and *DelCostello* does not apply retroactively, we reverse the district court's dismissal of Barina's action against NMU.

II. Barina's claim against Gulf

A. Retroactive application of *Mitchell*.

In *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981), we held that *Mitchell* was not to be applied retroactively to an action brought by an employee against his employer to set aside an arbitration decision. That ruling controls here.[6]

Gulf argues that *Singer* should not be followed because it was effectively overruled by *Local 1020 of the United Brotherhood of Carpenters v. FMC Corporation*, 658 F.2d 1285 (9th Cir. 1981), and *San Diego County District Council of Carpenters v. Cory*, 685 F.2d 1137 (9th Cir. 1982). In those cases, we did apply the short state limitation applicable to action to set aside commercial arbitration to claims arising prior to *Mitchell*. Neither case, however, discussed the retroactivity issue. More important, both cases involved a *union* suing an employer to have an arbitration decision set aside on the ground that the decision did not draw its essence from the collective bargaining agreements. That cause of action lacks a fair representation element and thus differs from the cause of action here and at issue in *Mitchell*. *United Brotherhood of Carpenters v. FMC Corporation*, 724 F.2d 815, 816-17 (9th Cir. 1984). Therefore, those cases do not effectively overrule *Singer*.[7]

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applied *DelCostello* retroactively. *Perez v. Dana Corporation*, 718 F.2d 581 (3d Cir. 1983); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983); *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Lincoln v. District 9 of the International Association of Machinists*, 723 F.2d 627 (8th Cir. 1983); *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983). The Seventh Circuit has also applied *DelCostello* retroactively without discussing the issue. *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 301-303 (7th Cir. 1983). *Edwards v. Teamsters Local Union No. 36* and *McNaughton II*, however, establish the law of this circuit and binds us. We also happen to agree with their analyses.

[6] Because the plaintiff was an airline employee in *Singer*, the action against the employer was brought under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, rather than under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. This distinction, which the court in *Singer* ignored, is without import and does not provide a basis for distinguishing *Singer*.

B. Retroactive application of *DelCostello*

We lack controlling precedent concerning *DelCostello*'s retroactive application in suits brought by an employee against his employer to set aside arbitration. Therefore, we must resolve the retroactivity question by weighing the three factors specified in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971). Those factors are (1) whether the decision establishes a new principle of law, (2) whether retroactive application will further or retard the purposes of the rule in question, and (3) whether applying the new decision will produce substantial inequitable results.

The first and the third factors militate against retroactivity here. *DelCostello* establishes a new principle of law because it imposes a limitation on the employee that is eight times shorter than the limitation that applied when his claim arose. Moreover, *DelCostello* deviated

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[7] In *McNaughton I*, we did apply *Mitchell* retroactively to a hybrid § 301/fair representation claim brought by an employee against his employer. In that case, however, we expressly declined to entertain plaintiff's contention that *Mitchell* should not be applied retroactively because the contention had not been raised in the district court. *Id.* at 1047 n. 5.

We reject Gulf's contention that *McNaughton I*'s reasoning requires application of California's 100-day limitation apart from its reliance on *Mitchell*. *Mitchell* is fundamental to *McNaughton I*'s analysis.

from the Supreme Court's prior direction in *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05, 86 S.Ct. 1107, 1112-13, 16 L.Ed.2d 192 (1966), that the applicable statute of limitations be drawn from state law. See *Pitts v. Frito Lay, Inc.*, 700 F.2d 330, 333 n.3 (6th Cir. 1983). As for the third factor, "it would . . . produce the most 'substantial inequitable results' to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law imposed on him."[8] *Chevron Oil*, 404 U.S. at 108, 92 S.Ct. at 356 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969)).

The second *Chevron Oil* factor does favor retroactivity in this case. A substantial purpose behind the six-month limitation developed in *DelCostello* is to give finality to labor disputes. 103 S.Ct. at 2294. Affording Barina four years in which to sue the employer detracts from the principle of finality. In our view, however, the strength of the considerations relating to the first and third factors outweigh that relating to the second factor in this case. *See Singer*, 652 F.2d at 1353. We conclude that *DelCostello* should not be applied retroactively to bar Barina's claim against Gulf.

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[8] The inequity of retroactive application of *DelCostello* is greatly diminished, of course, if the six-month limitation of *DelCostello* is applied to a claim arising before *DelCostello* but after *Mitchell*. The effect then is to *lengthen* the limitation from the customarily short (20-100 day) period applicable to actions to set aside commercial arbitrations. While prejudice to the defendant might occasionally result from the resurrection of a claim once thought dead, it is not likely to equal the prejudice to the plaintiff resulting from the unexpected death of a claim thought to be alive.

In this case, retroactive application of *DelCostello* would drastically shorten the limitation otherwise applicable to Barina's claim under the law of this circuit. The same was true in *Edwards* and *McNaughton II*, where we held *DelCostello* was not to be applied retroactively to unfair representation claims against a union.

Singer, *Edwards*, and *McNaughton II* confirm our decision not to apply *DelCostello* retroactively to Barina's suit against Gulf. Those cases presented issues analogous to the one we now decide. In *Singer*, we confronted the question whether a 100-day limitation mandated by *Mitchell* should be applied retroactively to an employee's suit against his employer; in *Edwards* and *McNaughton II*, the issue was whether *DelCostello*'s six-month limitation should be applied retroactively to an employee's fair representation suit against his union. All three cases resolved their analogous issues as we do here: they decided against retroactive application.

Because neither *Mitchell* nor *DelCostello* may be applied retroactively to Barina's suit against Gulf, the district court's dismissal of Barina's action against Gulf, like its dismissal of Barina's action against NMU, was erroneous. We reverse and remand for further proceedings.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 999, Docket 83-7976

ROMAN WELYCZKO,
Plaintiff-Appellant,

v.

U.S. AIR, INC. and THOMAS POMEROY as Chairman of the International Association of Machinists and Aerospace Workers, Local No. 75, District 141,
Defendants-Appellees.

Argued March 30, 1984
Decided April 25, 1984

Before KAUFMAN, KEARSE and PIERCE, Circuit Judges.

IRVING R. KAUFMAN, Circuit Judge:

Roman Welyczko appeals from the dismissal of his hybrid claim against his employer for wrongful discharge, and against his union for breach of its duty of fair representation. The district judge based his action upon the Supreme Court's decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), which established a six-month statute of limitations for claims under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). We hold that the *DelCostello* decision

has both retroactive and prospective application, and therefore affirm the dismissal of Welyczko's complaint.

I

We shall briefly review the facts. The parties have agreed that Welyczko was an employee of U.S. Air, Inc. ("U.S. Air") and that the terms and conditions of his employment were governed by a collective bargaining agreement between U.S. Air and the International Association of Machinists and Aerospace Workers ("IAM"). Welyczko was granted a 90-day medical leave of absence on May 5, 1975. On or about July 31 of that year, he wrote to his employer requesting an extension of leave. He reiterated that request by telegram on August 3. Approximately three days later, Welyczko received a letter from a U.S. Air executive, notifying him that his request for extended leave would be considered only upon receipt of corroboration from a physician that additional leave was necessary. Because his doctor was then on vacation, Welyczko decided to forward to U.S. Air a second copy of the physician's note, dated May 5. This document had accompanied his original application for leave.

U.S. Air refused to accept the copy as adequate substantiation. Accordingly, when Welyczko did not return to work, the company terminated his employment on August 26, 1975. This discharge was made retroactive to August 5, the day his authorized leave expired. Welyczko responded by requesting an officer of the IAM to arrange a special hearing on his discharge, pursuant to the collective bargaining agreeemnt. The IAM contradicts this by replying that Welyczko was advised that he himself would have to make a written request for such a hearing. In any event, the hearing was never held, and the discharge action became final.

The instant suit was commenced in New York State Supreme Court on March 5, 1981, and was subsequently removed to federal court. After *DelCostello* was decided,

appellees moved for summary judgment asserting that the statute of limitations adopted in that case should apply retroactively to Welyczko's cause of action, which accrued in 1975. On November 1, 1983, in a ruling from the bench, Chief Judge Munson granted the motion. Welyczko appeals.

II

In *DelCostello*, the Supreme Court decided that a uniform federal statute of limitations should apply to claims under § 301 of the LMRA. In the absence of an expressly applicable federal limitations period, the Court acknowledged, the "most closely analogous statute of limitations under state law" would normally govern. 103 S.Ct. at 2287. The Court concluded, however, that the "federal policies at stake and the practicalities of litigation make [federal law] a significantly more appropriate vehicle for interstitial lawmaking" in this instance. *Id.* at 2294. It therefore held that the six-month time limit on unfair labor practice complaints under § 10(b) of the National Labor Relations Act applied to § 301 claims as well.

Welyczko's claim must be construed as arising under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, which governs air carriers in lieu of the LMRA. *See* 29 U.S.C. §§ 142, 152; 45 U.S.C. § 181. We agree with the Ninth Circuit, however, that this distinction is "without import." *Barina v. Gulf Trading and Transportation Co.*, 726 F.2d 560, 563 n. 6 (9th Cir. 1984). The same policies which led the Supreme Court to apply a federal statute of limitations to claims under § 301 of the Labor Management Relations Act apply with equal force to substantively identical claims under the Railway Labor Act.

We have already applied the *DelCostello* rule retroactively, although the issue was not specifically discussed. *Assad v. Mount Sinai Hospital*, 703 F.2d 36 (2d Cir.), *vacated*, —— U.S. ——, 104 S.Ct. 54, 78 L.Ed.2d 73 (1983), *on remand*, 725 F.2d 837 (1984). Our action

there was consistent with the "general rule of long standing" that "judicial precedents normally have retroactive as well as prospective effect." *National Association of Broadcasters v. FCC*, 554 F.2d 1118, 1130 (D.C. Cir. 1976), *quoted in Kremer v. Chemical Construction Corp.*, 623 F.2d 786, 788 (2d Cir. 1980), *aff'd*, 456 U.S. 461, 101 S.Ct. 3107, 69 L.Ed.2d 970 (1982). All but one of the circuits considering the retroactivity of *DelCostello* have reached the same result. *Perez v. Dana Corp., Parish Frame Division*, 718 F.2d 581 (3rd Cir. 1983); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983); *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Curtis v. Int'l Brotherhood of Teamsters, Local 299*, 716 F.2d 360 (6th Cir. 1983) (per curiam) (dictum); *Storck v. Int'l Brotherhood of Teamsters, Local Union No. 600*, 712 F.2d 1194 (7th Cir. 1983) (per curiam); *Lincoln v. District 9 of the Int'l Ass'n of Machinists and Aerospace Workers*, 723 F.2d 627 (8th Cir. 1983); *Hand v. Int'l Chemical Workers Union*, 712 F.2d 1350 (11th Cir. 1983) (per curiam); *contra, Edwards v. Teamsters Local No. 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1599, 80 L.Ed.2d 130 (1984).

III

Appellant urges us to carve out an exception to the retroactivity principle so that his claim may proceed, arguing that under the three-factor test articulated by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the *DelCostello* holding should be given only prospective application. Most of the authorities just cited, however, applied the *Chevron* test and found that *DelCostello* should be applied retroactively. *See Perez v. Dana Corp., Parish Frame Division, supra*, 718 F.2d at 584-85; *Murray v. Branch Motor Express Co., supra* (adopting reasoning of *Perez*); *Edwards v. Sea-Land Service, Inc., supra*, 720 F.2d at 860-62; *Lincoln v. District 9 of the Int'l Ass'n of*

Machinists and Aerospace Workers, supra, 723 F.2d at 629-30. Moreover, in our view this case does not present circumstances in which the use of the *Chevron* test would be appropriate.

Were we asked to decide if retrospective effect should be given to a new rule which our court had pronounced, the policy factors enumerated in *Chevron Oil* would indeed be determinative. *See United States v. Fitzgerald*, 545 F.2d 578, 582 (7th Cir. 1976). Similarly, had the Supreme Court given no indication whether *DelCostello* should apply retroactively, a *Chevron Oil* analysis would also be in order. But these factors are not present here. The Supreme Court not only adopted a new statute of limitations in *DelCostello;* it applied that time bar retroactively to govern the very claim at issue in the case before it. We have noted that "the Supreme Court is well aware of how to avoid the effects of applying one of its rulings retroactively to the case at bar." *Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064, 1073 (2d Cir. 1977). Thus, when that Court itself has given retrospective application to a newly-adopted principle, "no sound reason exists for not doing so here." *Holzsager v. Valley Hospital*, 646 F.2d 792, 797 (2d Cir. 1981). A court of appeals must defer to the Supreme Court's directive on this issue, explicit or implicit. *See United States v. Fitzgerald, supra*, at 582. Certainly, its intended application is clear in this case.

We therefore decline appellant's invitation to exclude his suit from the *DelCostello* holding. Rather, we adopt for this circuit the rule that in employment termination cases, a six-month statute of limitations applies both retroactively and prospectively to wrongful discharge/failure to represent claims. Because Welyczko's complaint was filed more than five years after his termination, it is clearly time-barred. Accordingly, we affirm the judgment of the district court dismissing Welyczko's complaint.

OPPOSITION

BRIEF

No. 84-2016 (2)

In The
Supreme Court of the United States
October Term, 1984

GREYHOUND LINES, INC.,
Petitioner,

v.

MELODY WILHITE; LOCAL 1384,
AMALGAMATED TRANSIT UNION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the court below properly denied retroactive effect to this Court's decisions in *United Parcel Service v. Mitchell* and *DelCostello v. International Brotherhood of Teamsters.*

A. Whether a federal court of appeals my deny retroactivity to a Supreme Court decision, which adopts a federal statute of limitations, which significantly shortens the statute of limitations applicable at the time the case was filed.

B. Whether *Mitchell* and *DelCostello* apply in a case where there has been no "final and binding" determination of a grievance, arrived at through the collectively bargained method of resolving the grievance.

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STATEMENT OF THE CASE

Pursuant to 28 U.S.C. § 1254(1) Petitioner Greyhound Lines, Inc., has submitted a Petition for Writ of Certiorari to secure review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 1, 1985.

Initially, this case was filed as a civil action in the Superior Court for the County of King in the State of Washington on or about May 26, 1981. The case was removed to the United States District Court for the Western District of Washington at Seattle upon the petition of Greyhound Lines, Inc., on or about June 22, 1981. The co-defendant in the case, Local 1384, Amalgamated Transit Union, consented to the removal on or about August 3, 1981.

On August 11, 1983, Local 1384 filed a "Motion to Dismiss or for Summary Judgment." On August 18, 1983, Greyhound Lines, Inc., also filed a "Motion to Dismiss or for Summary Judgment."

On September 2, 1983, Wilhite filed a memorandum and affidavit in opposition to these motions. Local 1384 filed a reply memorandum on September 7, 1983. An "Order of Dismissal and Order of Remand to the King County Superior Court" was entered by the Honorable Walter T. McGovern, Chief United States District Judge, on September 9, 1983. Wilhite appealed that order and prevailed on appeal.

———o———

RELIEF REQUESTED

Wilhite opposes the Petition for Writ of Certiorari and respectfully requests that this court:

1) Deny the Petition for a Writ of Certiorari, or

2) In the alternative, affirm the United States Circuit Court of Appeals' judgment entered April 1, 1985.

Wilhite further petitions this Court for an award of attorney's fees pursuant to U.S. Supreme Court Rule 49(2).

———o———

STATEMENT OF THE FACTS

On December 15, 1979, Wilhite and a male co-worker walked two blocks from Greyhound's Seattle, Washington, shop to get a sandwich and soft drink for lunch, a common practice for Greyhound employees. They went to a tavern, called the Press Box Tavern, which serves hot home-made soups and sandwiches, and they ordered hot sandwiches and soft drinks to take out.

Upon return to work, Wilhite and her co-worker were called into the Superintendent's office. They were told that they were fired but could avoid a record of an "Alcohol Termination" by resigning immediately.

Wilhite under duress and without Union representation, signed a resignation and immediately thereafter appealed to Local 1384, requesting that a grievance be filed for discharge in violation of the contract.

Wilhite's male co-worker, confronted with the same choice said he would not resign. He was terminated and also appealed to Local 1384.

The Union requested hearings for both Wilhite and her male co-worker. A hearing was scheduled for the male co-worker. As a result of this hearing, he was reinstated as of December 27, 1979. The hearing officer determined that the penalty of dismissal was too severe for the alleged offense. The company reinstated Mr. Hanson with full retroactive pay and seniority.

In response to Wilhite's grievance, Greyhound failed to schedule a hearing, notifying Local 1384 that Ms. Wilhite had resigned and was no longer an employee. Local 1384 made no effort to further represent Wilhite and did not appeal the Company's rejection of her grievance within the time limits established by the Collective Bargaining Agreement.

As a result of these actions by both the Company and Union, Wilhite filed suit in King County Superior Court for the State of Washington.

———o———

ARGUMENT

This Court grants review on writ of certiorari "only when there are special and important reasons." Sup. Ct. R. 17. This case does not present circumstances justifying a writ.

Prior to *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983), the question of the timeliness of suits brought pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, was frequently litigated, but always under the same guiding principle—the application of the most suitable and analogous state stat-

ute or rule for timeliness. In adopting a new standard, *DelCostello* now establishes a federal statute of limitations for suits against employers and unions, commenced after an employee has exhausted all internal grievance procedures and administrative remedies.

Petitioner asserts that the issue of retroactivity requires this Court's clarification. However, for suits filed prior to *DelCostello*, this Court already has set forth a clear and concise policy regarding nonretroactivity. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 296 (1971), enumerated the three factors to be applied to establish nonretroactivity. The ultimate result in *Chevron Oil* was to deny retroactivity where the "new" statute of limitations to be imposed was significantly shorter than the previously applied statute of limitations.

This Court has remained consistently sensitive to the need to provide employees adequate time in which to prepare their cases against their employers and their unions. Most importantly, this Court has refused to apply retroactively cases whereby the plaintiffs would be deprived of their opportunity to obtain redress for wrongs occasioned them.

Moreover, in denying certiorari in *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036 [9th Cir., 1983, *cert. denied*, 104 S.Ct. 1599 (1984)], this Court determined that the exact same issue raised by this appeal did not warrant the Court's attention. Significantly, the *Edwards* case involved a fact pattern consistent with the *DelCostello* and *Mitchell* cases, unlike the case at hand which raises significant factual differences, as well as serious equitable concerns.

I. THE NINTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED DELCOSTELLO SHOULD NOT BE APPLIED RETROACTIVELY.

In declining retroactive application of a statute of limitations, this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971), set forth three factors to consider:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Prior to *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the lower federal courts had agreed that the applicable statute of limitations in hybrid cases alleging an employer's breach of a collective bargaining agreement under Section 301 of LMRA, 29 U.S.C. § 185, should be the applicable state statute of limitations. The application of state statutes of limitation was, in fact, the clear, past precedent. *DelCostello* effectively adopted a new, federal six month statute of limitations, applicable to both employers and unions where the employee's rights

under collective bargaining agreements had been pursued. The cases cited by the petitioner in support of its position merely demonstrate the application of the clear rules set forth in *Chevron Oil* and *DelCostello* by each of the appellate courts. In almost every single case cited by petitioner, either shorter state statutes of limitation were extended by *DelCostello* [*Ernst v. Indiana Bell Telephone Co.*, 717 F.2d 1036 (7th Cir., 1983), *cert. denied*, 104 S.Ct. 707 (1984); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir., 1983), *cert. denied*, 105 S.Ct. 292 (1984); *Perez v. Dana Corporation*, 718 F.2d 581 (3d Cir., 1983); *Smith v. General Motors Corp.*, 747 F.2d 372 (6th Cir., 1984) (*en banc*)], or the action was filed after *DelCostello* was decided (*Graves v. Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir., 1984)).

Also following *Chevron Oil*, and consistent with this Court's prior rulings, the 9th Circuit Court of Appeals in *Edwards, supra*, acknowledged what this Court initially set forth in *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969)—

> It would . . . produce the most "substantial inequitable results" . . . to hold that the respondent "slept on his rights" at a time when he could not have known the time limitation that the law imposed on him.

Chevron Oil, supra, at 108.

Likewise, in the present case, Wilhite filed long before the decision in *DelCostello*. She had only the precedent set forth by *Price v. Southern Pacific Transportation Co.*, 586 F.2d 750 (9th Cir. 1978), as a model for the limitation on bringing suit. Even *Mitchell*, decided only a month before she filed her suit, provided no clue as to the statute of limitations applicable in her case. Unlike *Mitchell*, she was afforded the opportunity to have her case reviewed by any fact-finding tribunal, which would have resulted in an appealable, final and binding decision. Moreover, the

applicable state statute of limitations was no less than two years.

Equity dictates the prospective application of *DelCostello*. Wilhite's claim was diligently pursued under the statutes of limitation applicable at the time her suit was filed. Wilhite's Breach of Contract/Duty of Fair Representation claims were filed May 26, 1981, well within the two year statute of limitations, established by *Price, supra*. If either *Mitchell* or *DelCostello* were to be applied to this case, Wilhite will have lost her opportunity to have her case regarding breach of contract and duty of fair representation ever adjudicated.

II. DELCOSTELLO SHOULD NOT BE THE PRECEDENT USED IN DECIDING THE STATUTE OF LIMITATIONS IN THIS CASE.

DelCostello should not be the precedent used in deciding the statute of limitations in this case. First, the *Mitchell* decision, which was refined by this court in *DelCostello*, was made just one month before Wilhite filed her case, and *DelCostello* was decided over one year after Wilhite filed her case. Second, this case does not involve a decision from an arbitration hearing. Wilhite has never been afforded a fact-finding hearing, of any nature, on her breach of contract/duty of fair representation claims.

The first reason advanced by Wilhite has already been discussed in *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, at 1353 (9th Cir. 1981) and in *Engelsberg v. Transcom Lines, Inc.*, 530 F. Supp. 628, at 632, (W.D. Wash. 1982). The Court in the *Singer* case refused to apply the rule decided in *Mitchell*, even though the Plaintiff had filed his case in 1978 and the *Mitchell* case was decided prior to oral argument in the *Singer* case. The Court stated, "Although the *Price* decision is not precisely on

point, we believe *Singer* might reasonably have relied upon it to conclude that he had three years to file a claim." 652 F.2d at 1353. *Engelsberg* was a case filed in 1980. In this case, the Court held that "the Court is bound by the holding in *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349 (9th Cir. 1981) to apply a two-year statute of limitations for the present action. In *Singer*, the Ninth Circuit held that the *Mitchell* characterization would not be applied retroactively. *Singer* found " . . . the rule of the *Mitchell* case is not one which might have been anticipated." 652 F.2d at 1353. The Court felt that the Plaintiff in *Singer* might reasonably have relied on the Ninth Circuit's statement in *Price* to conclude that he had a longer period than that expressed in *Mitchell* in which to file his suit. The District Court went on to state, "The *Singer* Court held that to apply the *Mitchell* rule retroactively in light of *Price* would be inequitable." That Court held that the holding in *Mitchell* would be given only prospective effect, and that the Plaintiff in *Engelsberg* would be governed by the Washington catchall statute of limitations, R.C.W. § 4.16. 130, a two year statute of limitations for actions for liability created by statute if not provided for elsewhere.

As a second objection to the use of the limitation in *Mitchell*, the Appellant points out that there was no grievance procedure involved in this case. The case was never submitted to an arbitrator from whose opinion Appellant might have appealed. Instead, a letter was written to the Company by the Union, a reply was written by the Company, and the entire situation was dropped. The grievance was never pursued. The holding in the *Mitchell* case was specifically aimed at providing a statute of limitation for "a hybrid '§ 301 and breach of duty suit' brought by an

employee against both his employer and his union in order to set aside a 'final and binding' determination of a grievance, arrived at through the collectively bargained method of resolving the grievance." 451 U.S. 56, 66.

This concept is also discussed in *Christianson v. Pioneer Sand and Gravel Co.*, 681 F.2d 577 (9th Cir. 1982). The Court discussed the purpose of arbitration and the finality of the decision reached by the arbitrator. The Court went on to say, "In the present case, however, the arbitration process was never reached; in fact, the Union never even processed appellant's grievances. Therefore, the concept of finality, which controlled in *Hines* and *Mitchell*, is totally inapposite here." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976); *United Parcel Service v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981).

Appellant was never afforded the grievance procedure which is such an integral part of the decision in the *Del-Costello* and *Mitchell* cases. She was not entitled to have an arbitrator hear the circumstances and render a decision in accordance with the collectively bargained agreement. She was bound by the unwillingness of the union to pursue what she felt was a legitimate grievance. To permit the employer and the union in this case to join forces and first, to disregard the collective bargaining agreement and then, to claim protective cover from the statute of limitations developed in cases where the agreement had been complied with procedurally would strike down the concepts of equity so fervently protected by this Court.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied. In the alternative, the decision of the lower court should be affirmed in this instance.

Respectfully submitted,

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REPLY

BRIEF

No. 84-2016

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

GREYHOUND LINES, INC.,
Petitioner,

v.

MELODY WILHITE; LOCAL 1384, AMALGAMATED TRANSIT UNION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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IN THE

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No. 84-2016

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

Petitioner Greyhound Lines, Inc., submits this reply brief in support of its petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 1, 1985.

OPINION BELOW

The district court's opinion is now reported at *Wilhite v. Greyhound Lines*, 119 L.R.R.M. (BNA) 3091 (W.D. Wash. 1983). The Ninth Circuit's opinion remains unreported.

REASONS FOR GRANTING THE WRIT

I. THE ABSENCE OF AN ARBITRATION DECISION IN THIS CASE HAS NO BEARING ON THE APPROPRIATE STATUTE OF LIMITATIONS

Wilhite urges that this Court consider whether the limitations periods prescribed by *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), apply to cases in which an employee's grievance has been resolved short of arbitration. This issue does not, however, merit the Court's attention, for the lower federal courts have resolved the question with remarkable unanimity.

Prior to *DelCostello*, numerous lower courts held that the statute of limitations ordained by *Mitchell* applied to cases in which employee grievances were resolved without proceeding to arbitration. *Perez v. Dana Corp.*, 545 F. Supp. 950, 951 (E.D. Pa. 1982), *aff'd*, 718 F.2d 581 (3d Cir. 1983); *Badon v. General Motors Corp.*, 679 F.2d 93, 96 (6th Cir. 1982); *Hall v. Printing & Graphic Arts Union*, 696 F.2d 494, 497 (7th Cir. 1982); *Aarsvold v. Greyhound Lines, Inc.*, 545 F. Supp. 622, 624 (D. Minn. 1982), *aff'd*, 724 F.2d 72 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 3538 (1984); *McNaughton v. Dillingham Corp.*, 707 F.2d 1042, 1046 (9th Cir. 1983), *reh'g denied*, 722 F.2d 1459 (9th Cir.), *cert. denied*, 105 S. Ct. 291 (1984). Recognizing that "[a] decision by the union not to proceed with a grievance is no less final a determination than an arbitration award," decisions after *DelCostello* likewise held that the absence of an arbitration award does not justify application of a different limitations period. *Vallone v. Local Union No. 705, International Brotherhood of Teamsters*, 755 F.2d 520, 522 (7th Cir. 1984); *Flores v. Levy Co.*, 757 F.2d 806, 809 (7th Cir. 1985); *Barina v. Gulf Trading & Transportation Co.*, 726 F.2d 560, 561 n.1 (9th Cir. 1984).

Wilhite suggests that some authority supports a contrary proposition, citing *Christianson v. Pioneer Sand & Gravel Co.*, 681 F.2d 577 (9th Cir. 1982). However, the Ninth Circuit itself has expressly rejected Wilhite's reading of *Christianson*, observing that a longer statute of limitations for grievances handled without arbitration "would be inconsistent with the policy of rapid disposition of labor disputes." *McNaughton*, 707 F.2d at 1046. The Ninth Circuit has subsequently reiterated this principle, holding that "[t]he same limitation periods apply whether an employee's grievance is resolved with or without going to arbitration." *Barina*, 726 F.2d at 561 n.1.

The lower federal courts have resolved this question without hesitation or conflict. Accordingly, there exists no reason for this Court to exercise its discretion to review the question presented by Wilhite.

II. BY REFUSING TO GIVE RETROACTIVE APPLICATION TO THE PRINCIPLES OF *DELCOSTELLO*, THE DECISION BELOW CONFLICTS WITH THE VIEWS OF OTHER COURTS OF APPEAL ON ISSUES OF ENDURING IMPORTANCE

In its petition for a writ of certiorari, Greyhound urged this Court to consider two issues raised by the decision below. The first concerned the ability of a lower federal court to deny retrospective effect to a newly-announced principle that this Court has itself applied retroactively. The second related to the propriety of a retroactivity analysis when this Court resolves widespread confusion in the circuits. Wilhite does not contest the importance of these issues. Instead, she attempts to minimize the circuit conflict over *DelCostello*'s retroactivity by suggesting that most cases have applied *DelCostello* retrospectively only to extend "shorter state statutes of limitation . . . ." Brief in Opposition, p. 6. Wilhite is incorrect. Many courts have applied *DelCostello* retroactively when the effect was to shorten

statutes of limitations apparently applicable at the time of filing. The decision below clearly conflicts with the views of these courts.[1]

DelCostello illustrates the route commonly traveled by cases in which retroactivity has been considered. The district court initially ruled that DelCostello's claim, filed on March 16, 1978, was timely under a three-year Maryland statute of limitations. 510 F. Supp. 716, 720 (D. Md. 1981). After this court decided *Mitchell*, the district court reconsidered and dismissed DelCostello's claim as untimely under Maryland's 30-day limitation governing actions on arbitration awards. 524 F. Supp. 721 (D. Md. 1981). After the Fourth Circuit affirmed, 679 F.2d 879 (4th Cir. 1982), this Court ruled that a six-month statute of limitations governed hybrid Section 301/duty of fair representation cases and remanded the case for consideration of DelCostello's tolling defense. 462 U.S. 151 (1983). On remand, the Fourth Circuit ruled that DelCostello's claim was barred by retroactive application of the six-month limitations period established by this Court. *DelCostello v. Teamsters, Local 557*, 762 F.2d 1219 (4th Cir. 1985). Similarly, in the companion case to *DelCostello*, the plaintiffs' claims had initially been held subject to limitations periods far longer than six months. *See Flowers v. Local 2602, Steelworkers*, 671 F.2d 87, 89 (2d Cir. 1982) (describing history of case), *rev'd sub nom. DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

[1] In responding to this argument, Greyhound does not concede that *Mitchell* or *DelCostello* shortened the statute of limitations governing Wilhite's claim, which was filed after the decision in *Mitchell*. The period applicable to hybrid suits against an employer in the Ninth Circuit was not settled prior to *Mitchell*, despite Wilhite's protestation that *Price v. Southern Pacific Transport. Co.*, 586 F.2d 750 (9th Cir. 1978), supplied definitive guidance. *Price* related only to the statute applicable to an action against a union. The court of appeals specifically decided to "express no opinion with respect to the California statute applicable to an employee's cause of action against an employer in a duty of fair representation case . . . ." 586 F.2d at 753.

This Court's decision in *DelCostello* therefore operated to shorten, not lengthen, the limitations periods previously applied to the litigants before the Court. A number of other courts have similarly applied *DelCostello*'s six-month limitations period to dismiss claims filed before this Court decided *Mitchell*. *See, e.g., Scaglione v. Communications Workers of America, Local 1395*, 586 F. Supp. 1018 (D. Mass. 1983), *aff'd*, 759 F.2d 201 (1st Cir. 1985) (suit filed in 1977 and amended in 1979); *Welyczko v. U.S. Air, Inc.*, 733 F.2d 239 (2d Cir.), *cert. denied*, 105 S. Ct. 512 (1934) (suit filed on March 5, 1981); *Taylor v. Ford Motor Co.*, 761 F.2d 931, 933-34 (3d Cir. 1985) (applying *DelCostello* to suit filed in 1980, despite earlier decision holding six-year statute applicable); *Murray v. Branch Motor Express*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, 105 S. Ct. 292 (1984) (suit filed in 1978); *Ender v. Chrysler Corp.*, 119 L.R.R.M. (BNA) 2299, 2301 (N.D. Ill. 1983), *aff'd mem.*, 749 F.2d 34 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2706 (1985) (suit filed in 1973); *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, 105 S. Ct. 292 (1984) (cases filed in 1980); *Harpp v. General Electric Co.*, 571 F. Supp. 426 (N.D.N.Y. 1983) (summons served in 1977).

In none of these cases did *DelCostello* lengthen a statute of limitations applicable at the time the case was filed.[2] Wilhite's valiant efforts thus cannot alter the fact that the Ninth Circuit's refusal to accept the retroactivity of *DelCostello* conflicts with the view of every other court that has considered the issue. In contrast to

[2] *DelCostello* did lengthen the statute of limitations applicable under *Mitchell* in the vast majority of states, including Washington, having statutes applicable to actions to vacate arbitration awards. In all of the cases cited, however, plaintiffs filed their claims before this Court decided *Mitchell*.

the court below, other courts of appeal have denied retroactivity only in two strictly limited situations. The Second Circuit, alluding to perceived delays by the trial judge, declined to apply *DelCostello* to a case filed in 1975, in which trial occurred in June of 1979, nearly two years before *Mitchell*. *Byrne v. Buffalo Creek Railroad Co.*, 765 F.2d 364, 367 (2d Cir. 1985) (characterizing case as "unique" and presenting "extraordinary circumstances"). The Fourth Circuit, over vigorous dissent, has created a limited exception to *DelCostello's* retroactivity in one jurisdiction, West Virginia, in which no state statute of limitations as short as six months was ever arguably applicable. *Zemonick v. Consolidated Coal Co.*, 762 F.2d 381, 387 (4th Cir. 1985). The Fourth Circuit has refused to extend *Zemonick* to cases arising in a jurisdiction, such as Washington, having a shorter "statute specifically applicable to suits to overturn arbitration awards." *DelCostello*, 762 F.2d at 1222, n.3.

Unlike the decision below, the opinions creating these two exceptions do not undermine the precedential effect of *DelCostello*, for the plaintiffs in *Byrne* and *Zemonick* were not similarly situated to DelCostello and Flowers.[3] The facts surrounding Wilhite's claim, on the other hand, are in all material aspects identical to those present in the two cases in which this Court applied *DelCostello*'s principles retroactively. Consequently, the court below was not free to ignore this Court's unambiguous application of the six-month limitations period to the claims in *DelCostello*.

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[3] Unlike Zemonick, the plaintiffs in *DelCostello* and *Flowers* sued in states having arguably applicable statutes of limitations of less than six months. So did Wilhite. *See* Wash. Rev. Code § 7.04.180. *Compare Zemonick*, 762 F.2d at 384-85 (distinguishing cases in jurisdictions having statutes pertaining to arbitrations, where litigants "should have known that a much shorter limitations period might be held applicable"). Further, unlike Byrne, the plaintiffs in *Flowers* and *DelCostello* faced the statute of limitations defense long before their cases proceeded to trial. So did Wilhite.

The Ninth Circuit's conflict with other circuits is manifest. That disagreement relates to fundamental questions, not simply to retroactive application of *DelCostello*. The court below has misunderstood the scope of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), using that case as a license to reevaluate considered determinations of this Court.[4] Its misapprehension must be corrected now, before the court of appeals eviscerates the precedential value of another decision of this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review and reverse the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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September 18, 1985

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[4] Wilhite's Brief in Opposition reflects the Ninth Circuit's erroneous use of *Chevron Oil*, claiming that retroactivity must be denied whenever "the 'new' statute of limitations to be imposed was significantly shorter than the previously applied statute of limitations." Br. in Opp., p. 4. This *per se* approach is unmistakably contrary to precedent of this Court and must be rejected.

OPINION

SUPREME COURT OF THE UNITED STATES

RAYMOND L. SAVILLE, JR. *v.* WESTINGHOUSE ELECTRIC CORPORATION AND UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, LOCAL 107

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84–2034. Decided October 15, 1985

The petition for writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Third Circuit held that *DelCostello* v. *International Brotherhood of Teamsters*, 462 U. S. 151 (1983) (actions brought under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, are governed by the six-month statute of limitations provided in § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b)), applies retroactively. In so holding, the Court of Appeals followed a prior decision in that court which relied on the factors outlined in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971), in making that retroactivity determination. See *Perez* v. *Dana Corp., Parish Frame Div.*, 718 F. 2d 581 (CA3 1983). For the reasons stated in my dissent in *Greyhound Lines, Inc.* v. *Wilhite*, No. 84–2016, I would grant certiorari in this case.